



Submission to the National Public Procurement Policy Unit

Response to Consultation Paper “Improving SME access to Public Procurement”

S/07/01

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The Competition Authority
An tÚdarás Iomáíochta

SUMMARY

Background

One of the statutory functions of the Competition Authority is to promote competition in the economy in a number of ways:

- Identifying and commenting on the effects on competition of existing laws or administrative practices;
- Advising the Government, its Ministers and agencies, about the implications for competition of proposed legislation or regulation;
- Studying and publicising how competition operates in the economy; and
- Advising and informing the public and public authorities about competition issues generally.

It is in this context that the Competition Authority is pleased to contribute to the National Public Procurement Policy Unit's consultation on improving SME access to public procurement.

Overview

As a general observation, the Competition Authority is supportive of any measures to improve access to public procurement as a means of promoting competitive market outcomes to the benefit of suppliers and of public sector purchasers. The Authority endorses the contents of the Consultation Document, particularly the ideas in the sections "What the NPPPU/State agencies could do" and "What contracting authorities could do".

Unnecessary requirements may have the unintended effect of excluding appropriately qualified firms from markets or favouring larger firms over smaller ones.

In this brief submission, the Competition Authority wishes to highlight a number of specific issues which have come to its attention in the course of its work, either through its own research or as a result of complaints from the public. Some of these issues are specific to particular markets while others have a more general application.

These issues are as follows:

- Excessive insurance requirements;
- Duration of contracts;
- Inappropriate prequalification requirements;
- Training of staff;
- Tender specifications;
- Compliance issues;

- Lead in times; and
- Granting of 100% contracts to one firm.

The Competition Authority would be happy to meet the National Public Procurement Policy Unit to further discuss the issues raised in this submission.

Recommendations

Recommendation 1.

The National Public Procurement Policy Unit should

- (a) inform public bodies that the advice of Irish Public Bodies Mutual Insurances Limited in relation to recommended levels of professional indemnity insurance is not binding and that insurance cover for clients who opt to use a sliding scale will continue to apply as normal; and
- (b) promote the use of a sliding scale for professional indemnity insurance levels.

Recommendation 2.

Public sector contracts should always be granted for an appropriate defined period, based on the nature of the product or service involved. Contracts must include a review clause and a mechanism for withdrawal in the event of non-performance by the supplier.

Recommendation 3.

Public authorities should ensure that they use appropriate prequalification criteria which do not have the effect of excluding smaller firms for the opportunity to tender for public work.

Recommendation 4.

All public sector staff involved in procurement should be adequately trained in the guidelines and procedures governing the offer of contracts.

Recommendation 5.

When preparing to award a contract, public authorities should allow sufficient time between the award of the contract and its commencement to ensure that successful tenderers will have adequate lead-in times to commence supply of the goods or services involved.

SPECIFIC ISSUES

1. Excessive insurance requirements

In its Final Report on the Architect's profession, published in March 2006, the Competition Authority expressed concerns in relation to the high levels of professional indemnity insurance that Irish Public Bodies Mutual Insurances Limited (IPB)¹ recommends that contractors should be required to have. An unnecessarily high requirement for professional indemnity insurance excludes small firms from providing services to public bodies or forces them to bear the additional costs of having a higher level of professional indemnity insurance than they would otherwise need.

The Department of the Environment, Heritage and Local Government introduced a sliding scale and set of guidelines for professional indemnity insurance levels to managers of local and public bodies in August 2004. The Competition Authority recommended in its Final Report on Architects that the Department monitor and review the use by local authorities of its sliding scale on a regular basis.

Since the publication of its Report on Architects, IPB has confirmed to the Competition Authority that its advice in relation to levels of professional indemnity insurance is not binding on its clients and that insurance cover for clients who opt to use the sliding scale will continue to apply as normal. Ensuring that local authorities and other public bodies are made aware of this situation will improve access to public work for small contractors who would not normally carry such high levels of professional indemnity insurance.

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- (b) promote the use of a sliding scale for professional indemnity insurance levels.

2. Contract period

The length of the contract period can be a key issue in terms of access for SMEs to public sector contracts. There should always be a defined contract period so that other suppliers can have the opportunity to tender for the right to supply in the future.

The optimal length of the contract period will depend on the nature of the product or service being supplied. In cases where there are significant investment costs for suppliers, a longer contract period may be appropriate. In other cases, for example the supply of stationery or

¹ Irish Public Bodies Mutual Insurances Limited underwrites the insurance of Local Authorities, Health bodies, Vocational Education Committees and various other public bodies.

furniture, a shorter contract period may be more appropriate to avoid foreclosure of the market to other suppliers.

Contracts should include a review clause and a mechanism for withdrawing the contract in the event of failure to meet the terms.

Recommendation 2.

Public sector contracts should always be granted for an appropriate defined period, based on the nature of the product or service involved. Contracts must include a review clause and a mechanism for withdrawal in the event of non-performance by the supplier.

3. Prequalification requirements

Another issue is that of prequalification requirements. The Authority is aware of a number of cases where architectural practices were required to have a minimum turnover of millions of euro in order to pre-qualify for a project. Such requirements, if replicated across the entire public sector, would have the effect of excluding competent but small firms from competing for public work and reducing choice for public sector buyers. Other relevant criteria such as skills, track record and experience can be taken into account in assessing competence without leading to the exclusion of smaller firms.

A related issue is the practice of excluding from consideration tenderers who have not responded to previous requests for tender. This can result in firms submitting bids even if they are not interested in a particular contract, simply to ensure that they will not be disqualified from a future tender process and leads to unnecessary additional work for public authorities in evaluating unrealistic bids. The practice also causes difficulty in detecting false bids in bid-rigging cartel cases.

Recommendation 3.

Public authorities should ensure that they use appropriate prequalification criteria which do not have the effect of excluding smaller firms for the opportunity to tender for public work.

4. Training

As the consultation document points out, significant developments have taken place in the professionalisation of public procurement, with the development of bespoke courses for senior-level staff in both DCU and the IPA. However, this level of expertise in procurement may not filter down

to all grades within the public service. All public sector staff with responsibility for procurement must be aware of the guidelines and procedures governing the offer of contracts.

Take for example a case where local authority staff are threatened with legal action by firms whose tender has not been accepted. It is one of the basic principles of procurement that the lowest-priced bid may not necessarily be the successful one. Local authority staff need to be aware of this fact to ensure that they do not incorrectly award contracts on the false premise that to do otherwise may lead to legal action. Otherwise, an SME which may have won on the grounds of customer care, local service or innovation, rather than price, may be forced out of the market to the ultimate detriment of local authorities.

Recommendation 4.

All public sector staff involved in procurement should be adequately trained in the guidelines and procedures governing the offer of contracts.

5. Tender specifications

Tenders should be written in a vendor neutral manner, so as to ensure that they not exclude groups of potential vendors based on unnecessarily rigid or product/brand based specifications. In addition, tender requests should give sufficient response times to as not to inadvertently disadvantage a smaller firm which might have fewer administrative resources to devote to the tendering process. These issues, which the Authority has come across in the course of its work, are in line with the findings of the surveys referred to in the Consultation Document.

6. Compliance issues

A clear process needs to be put in place to pursue issues regarding the operation of the procurement process, particularly in the case of bodies other than Government Departments. Such issues may relate to the running of a particular tender competition or a decision to award or extend a contract without a tender process at all.

It is of course open to an aggrieved party to seek a judicial review of a decision by a public authority. However, the cost of this could be prohibitive for SMEs and it is very unlikely that a firm would seek a judicial review in respect of a small local contract. The Competition Authority is aware of instances where firms who were dissatisfied with a tender process had no other means of pursuing the issue if the public authority concerned was not prepared to engage with them on the matter.

7. Short lead-in times

The Competition Authority has been made aware of instances where successful tenderers have been given very short periods between notification and commencement of the contract. This may act as a barrier to entry for SMEs, as they may not be able to fulfill the tender's

requirements where they have been given extremely short lead-in times due to the need to order raw or bulk materials in advance, limited storage space, or other constraints which larger or vertically-integrated firms may not face.

When preparing to award a contract, public authorities should allow sufficient time between the award of the contract and its commencement to ensure that successful tenderers will have adequate lead-in times to commence supply of the goods or services involved. This in turn means that tenders for public contracts should be sought in good time so that the period between awarding the contract and commencing supply is not shortened to ensure that there is no gap between the old and new contracts.

Recommendation 5.

When preparing to award a contract, public authorities should allow sufficient time between the award of the contract and its commencement to ensure that successful tenderers will have adequate lead-in times to commence supply of the goods or services involved.

8. Granting 100% of contracts to one firm

Where tenders are sought in a market characterised by one large player and a competitive fringe, public sector purchasers need to be aware that their decisions may lead to the creation of a monopoly.

A particular danger arises where tenders are sought in a market characterised by one large firm and one or a few small firms (the "competitive fringe"). In these market circumstances, where a purchaser consistently awards the entirety of a tender to one firm, typically on the grounds of cheapest price, they may end up causing firms in the competitive fringe to exit the market. Thus, while a competitive fringe exists, the large firm may tender a competitive price and consequently win 100% of the contract. To take an extreme example, suppose a large firm wins the entirety of a contract in successive years because it is cheaper by just €1 in each year. The purchaser will have saved €5 over 5 years. However, if this occurs over successive years, other firms are likely to exit the market and the remaining firm may become a monopolist. Depending on the particular market circumstances, the monopolist may be able to increase its prices significantly above the competitive price which previously obtained. Consequently, the short-term economic benefits to the purchaser may be outweighed by the medium to long term cost of paying a monopoly price for the good or service in question.

Public sector purchasers should monitor such situations to ensure that their decisions do not facilitate the creation of dominance in a market. For instance, as stated on p.7 of the consultation document, purchasers could "*consider breaking requirements into lots which could be supplied by small enterprises*". By awarding contracts to multiple suppliers, purchasers can ensure the continuation of a number of alternative suppliers. Indeed this is a tactic used in the private sector. This would limit the opportunities for

monopolization of the market and ensure the maintenance of competitive discipline on the largest firm in the market.



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